

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER )  
RIGHT G(W)43186-76H BY LARSON CREEK )  
WATER USERS ASSOCIATION )

FINAL  
ORDER

\* \* \* \* \*

The Proposal for Decision (Proposal) in this matter was issued on June 11, 1993. The Proposal recommended the Department of Natural Resources and Conservation (Department) grant an authorization to Larson Creek Water Users Association to change the place of use of the appropriation water right documented in Statement of Claim 76H-W-043186-01 as requested in Application to Change Appropriation Water Right G(W)43186-76H. The application requested authorization to change the place of use from 17.07 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 17, Township 9 North, Range 20 West, Ravalli County, Montana, to 4.00 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  and 1.00 acre in the N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 20, and 5.00 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , 1.7 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  and 4.3 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 19, Township 9 North, Range 20 West, Ravalli County, Montana, for a total of 16.00 acres. Objector Baldwin Land Partnership filed timely exceptions to the Proposal but did not request oral arguments. No responses to the exceptions were received.

Objector Baldwin takes exception to the Proposal's Conclusion that the requested change would not adversely affect other appropriators. Objector argues the Findings and Conclusion on

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the extent of the historic water right do not reflect the actual historic diversion and use of water, and to authorize changing the full amount of water requested, 16 miners inches, to a new place of use would result in an expansion of the ground irrigated by the historic water right. Objector Baldwin argues the Proposal recommends an authorization which changes three miners inches of water more than the historic use of the water right.

Close review of the entire record in this matter raises serious questions about the historic use of the water right which Applicant proposes to change. These questions are the result of conflicting evidence in the record about the amount of water which has been used to irrigate the historic place of use, the area of the historic place of use which was or was not irrigated, and the time period the historic water right was or was not used. The record contains evidence on both sides of the argument.

As stated by the Proposal in Findings of Fact 5, 6, and 13, substantial credible evidence exists supporting the use of the water right in Statement of Claim 76H-W-043186-01 as claimed, including the portion which is the subject of this application for a change. Conclusion of Law 8 establishing the extent and limit of the Department's authority in pursuing questions on historic water rights is an accurate expression of the precedent set by a number of past Department rulings. The Department can and must make a determination whether the subject water right exists before it can authorize a change. The determination is not an adjudication of the subject water right. See In re

Applications 49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen; In re Application 42666-g41F by Richard MacMillan; In re Application G(W)096235-76GJ by Magellan Resources, Inc. It is a threshold determination which must be made on the preponderance of the substantial credible evidence in the record. This requires analysis and weighing of the evidence in the record.

An agency's final order may not reject or modify a finding of fact in a proposal for decision unless the agency first determines from a review of the complete record that the finding of fact was not based on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1991). Findings of Fact 5, 6, and 13 in the Proposal for Decision are based on substantial credible evidence in the record and are consistent with that evidence and with the record as a whole. Findings of Fact 5, 6, and 13 are not in error, and consequently will not be modified.

Conclusion of Law 8 is the correct conclusion to be drawn from the Findings of Fact and from precedent. Therefore, Conclusion of Law 8 will not be modified.<sup>1</sup>

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<sup>1</sup> It is important for Applicant to understand this conclusion is not an affirmation of the historic water right as claimed. The questions about the extent of the actual historic water right can only be finally answered by the Montana Water Courts in the ongoing adjudication of all water rights in this hydrologic basin. Any authorization to change a water right is subject to the final determination of the Water Courts as to the extent of the water right. If the final determination of the Water Courts reduces the claimed amount of water, the authorization would be subject to reinterpretation. See In re Applica-

Having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the June 11, 1993, Proposal for Decision and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, an Authorization to Change Appropriation Water Right is granted to Larson Creek Water Users Association for Application G(W)043186-76H to change the place of use of Statement of Claim 76H-W-043186-01. The place of use shall be changed from 17.07 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 17, Township 9 North, Range 20 West, Ravalli County, Montana, to 4.00 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  and 1.00 acre in the N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 20, and 5.00 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ , 1.7 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  and 4.3 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 19, Township 9 North, Range 20 West, Ravalli County, Montana, for a total of 16.00 acres.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, and § 85-2-404, MCA.

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tions 20736-s41H and 20737-s41H by City of Bozeman; In re Application G45422-76M by Paul A. and Natalie L. Hanson.

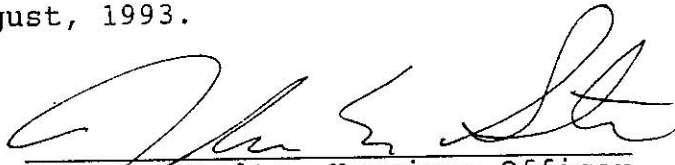
B. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, 1610 South 3rd St. West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

E. The deadline for completion of this Authorization, and filing the Notice of Completion of Change of Appropriation Water Right (Form 618) shall be December 31, 1994, verifying that the change has been completed as authorized.

Dated this 13<sup>th</sup> day of August, 1993.

  
John E. Stults, Hearings Officer  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 16<sup>th</sup> day of August, 1993, as follows:

Larson Creek Water Users  
Association  
% Lonnie Umphlett, Pres.  
625 Timber Trail  
Stevensville MT 59870

Baldwin Land Partnership  
3533 Salish Trail  
Stevensville, MT 59870

Vivian A. Lighthizer,  
Hearing Examiner  
Department of Natural  
Resources & Conservation  
1520 E. 6th Ave.  
Helena, MT 59620-2301

Tom & Janine Stellick  
303 S. Kootenai Rd.  
Stevensville, MT 59870

Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

T.J. Reynolds, Interim Manager  
Missoula Water Resources  
Division Regional Office  
1520 E. 6th Avenue  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION     )  
FOR CHANGE OF APPROPRIATION WATER     )     PROPOSAL FOR DECISION  
RIGHT G(W)43186-76H BY LARSON CREEK)  
WATER USERS ASSOCIATION             )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on May 3, 1993, in Hamilton, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Larson Creek Water Users Association under the criteria set forth in 1993 Mont. Laws 370.

APPEARANCES

Applicant Larson Creek Water Users Association appeared at the hearing by and through Michael J. McBride.

Lonnie Umphlett, Debra Umphlett, and Mary Neshek appeared at the hearing but did not testify.

Donald B. Koeppen appeared as a witness for the Applicant.

Objector Baldwin Land Partnership appeared by and through Carl W. Baldwin, Jr. (Carl Baldwin).

Jenny Stewart, Charlynn Steele, Marlene Ebel, Joyce Moerkerke, Darlene Cotton, William Gilleard, John Notti, and Lee Yelin of Water Rights, Inc. appeared as witnesses for Baldwin Land Partnership.

Objector Tom and Janine Stellick appeared at the hearing by and through Tom Stellick.

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Wes McAlpin, Water Rights Specialist III, and R.H. (Arlo) White, Water Rights Specialist II, with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) appeared at the hearing.

#### EXHIBITS

Applicant offered 11 exhibits for inclusion in the record. All exhibits except Applicant's Exhibit K were accepted into the record without objection.

Applicant's Exhibit A consists of eight pages and is a copy of the letter sent to the Missoula Water Resources Regional Office with the application and copies of the application and supplements.

Applicant's Exhibit B consists of 15 pages. The first six pages are the Sharrott Creek Irrigation Water Agreement to form an unincorporated association named the Larson Creek Water Users Association. The next three pages are the by-laws of Larson Creek Water Users Association. The six remaining pages contain the agreement to buy/sell between Donald B. and Grace E. Koeppen and the Larson Creek Water Users Association.

Applicant's Exhibit C consists of two regular size pages and one larger folded page. The large page is a map showing, among other things, the location of Sharrott Creek, Larson Creek, Kootenai Creek, and the various parcels of property which have been numbered. The first two pages identify the property owner of each numbered parcel on the maps, the water right in miner's inches, and the land description.



Applicant's Exhibit D consists of four pages which are copies of a computer printout of the Department's water right listing by source name by priority. The pertinent portion of this printout is the rights on Sharrott (Sharret, Sharrot, Sharratt) Creek.

Applicant's Exhibit E is a copy of a computer printout of the Department's water right listing by source name by priority date. The pertinent portion of this printout is the rights on Larson Creek.

Applicant's Exhibit F is a very poor copy of Statement of Claim W76H-043186 filed by Irwin C. Buchholz. The entire exhibit is not legible. There is, however, a legible copy of this claim in the Department file.

Applicant's Exhibit G was a field form completed by the State Engineers Office during the water resources survey. The exhibit was not in the exhibit folder when the Hearing Examiner returned to Helena. The Hearing Examiner notified all parties by a Notice dated May 12, 1993, of her intent to have the Missoula Water Resources Regional Office send her a replacement. The replacement field form was received on May 17, 1993.

Applicant's Exhibit H consists of four regular size pages and two larger pages. The first two regular size pages describe the workings of the proposed project. The last two regular size pages are drawings of the diversion and distribution works. One large page shows a profile of the proposed pipeline. The second large page is a map showing the various parcels and the new

acreage to be irrigated with the Koeppen water right.

Applicant's Exhibit I consists of four pages. The first two are a Notice of Purchasers' Interest. The last two are a copy of the Water Right Transfer Certificate which transfers a water right from Donald B. and Grace E. Koeppen to the Larson Creek Water Users Association.

Applicant's Exhibit J consists of seven pages. The first two pages are a letter dated January 15, 1993, to the Missoula Water Resources Regional Office from Fred Burnell, Chairman of the Board of Larson Creek Water Users Association. Page three is a letter to whom it may concern from Donald B. Koeppen describing his use of the water right sold to Larson Creek Water Users Association. The fourth page is a hand-drawn map and the last three pages describe the hand-drawn map.

Applicant's Exhibit K is a letter dated May 1, 1993, to whom it may concern from William A. Worf verifying that he had transported water to Donald Koeppen through the Worf pipeline each year from 1983 to 1992.

Carl Baldwin objected to Applicant's Exhibit K becoming a part of the record because there were no data to support the statements made in Mr. Worf's letter about delivering water to Mr. Koeppen. However, Mr. Baldwin did not produce data to contradict the statements made in Mr. Worf's letter. Applicant's Exhibit K is accepted into the record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make

the following:

FINDINGS OF FACT

1. 1993 Mont. Laws 370 state in relevant part, "An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature." The requirement of the legislative approval does not apply in this matter.

2. On February 14, 1992, Larson Creek Water Users Association filed an Application for Change of Appropriation Water Right to change the place of use of Statement of Claim 76H-W043186-01. The place of use would be changed from 17.07 acres in the  $W\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$  of Section 17, Township 9 North, Range 20 West, Ravalli County, Montana,<sup>1</sup> to 4.00 acres in the  $SW\frac{1}{4}NW\frac{1}{4}$  and 1.00 acre in the  $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$  of Section 20, and 5.00 acres in the  $SE\frac{1}{4}NE\frac{1}{4}$ , 1.7 acres in the  $S\frac{1}{2}S\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}$  and 4.3 acres in the  $NW\frac{1}{4}SE\frac{1}{4}$  of Section 19 for a total of 16.00 acres. (Department file and Applicant's Exhibit A.)

3. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on December 2, 1992. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application.

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<sup>1</sup>Unless otherwise specified, all land descriptions in this Proposal are located in Township 9 North, Range 20 West, Ravalli County, Montana.

The Department received two objections to the application and notified Applicant of these objections by a letter dated December 28, 1992. (Department file.)

4. Applicant's diversion works would consist of a 6.00-inch by 8.00-inch by 13.00-foot intake flume leading to an 8.00-inch by 10.00-inch by 4.00-foot screen box with a 4.00-inch water line outlet to the 4.00-inch delivery line.

Applicant's delivery system would consist of a four-inch pressurized pipe from Sharrott Creek to Larson Creek. The line would contain, in tandem, a flow meter; a four-inch gate valve; and an air pressure relief valve at Station 4. All the water diverted would pass through the flow meter. The line would be tapped at Station 7 for three inches of water destined to irrigate Property 1, three acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 19, and two inches of water at Station 13 for irrigation of Property 3, one acre in the S $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  and one acre in the N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 19. The four-inch line would terminate at Station 22+75 with a six-inch pipe multi-valve manifold distributor which would divide the remaining water and distribute it to five water lines leading to the remaining properties as follows: A 1.25-inch line would supply water to Property 2 for irrigation of .75 acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$  and .25 acre in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 19. A one-inch line would supply water to Property 4, one acre in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 19. A 1.25-inch line would supply water to Properties 5 and 6, one acre in the S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 19 and one acre in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 19. A two-inch line

would supply water to Properties 7 and 8, two acres in the  $W\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$  of Section 19 and two acres in the  $W\frac{1}{2}W\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$  of Section 20. A 1.5-inch line would supply water to Properties 9 and 10, two acres in the  $SE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$  of Section 20 and one acre in the  $N\frac{1}{2}N\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$  of Section 20. The total volume of water delivered would be controlled by regulating the flow with the four-inch gate valve installed in tandem with the flow meter. To initially set the gate valve, water would be introduced into the system with all valves open. Once the lines are completely filled, the gate valve would be adjusted to allow a flow rate of 16 miner's inches and locked, thereby assuring the maximum flow could not exceed 16 miner's inches. Users of this water would apply water only by sprinkler systems. Each system would be equipped with a flow control nozzle set to deliver 4.5 to 5.00 gallons per minute. Each irrigator would be limited to a maximum of two sprinklers per miner's inch of subscribed water and could apply this water only to the above-mentioned acreage. All the users are members of the Larson Creek Water Users Association. (Testimony of Michael McBride, Department file, and Applicant's Exhibit H.)

5. On December 16, 1991, Larson Creek Water Users Association entered into a written Agreement to Buy/Sell to purchase a portion, 16 miner's inches, of a Sharrott Creek water right from Donald B. and Grace E. Koeppen. This water right was claimed by Statement of Claim 76H-W043186-00 filed by Irwin C. Buchholz. The claimed priority date is April 1, 1895. When the

Koeppens purchased their property, the claimed water right was transferred to them. (Applicant's Exhibit I, Department file, and testimony of Donald Koeppen.)

6. Sharrott Creek is a decreed stream. On March 27, 1922, District Judge James M. Self decreed that E. F. Hill was entitled to use 75 miner's inches of water from Sharrott Creek with a priority date of April 1, 1895, and that Henry Weicher was entitled to 50 inches of water from Sharrott Creek with a priority date of April 1, 1895. E. F. Hill owned and irrigated 80 acres in the S $\frac{1}{2}$ SW $\frac{1}{2}$  of Section 17. Henry Weicher owned and irrigated acreage in the NW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 20 and NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 19. The Hill and Weicher rights are eighth on the ladder of priority for Sharrott Creek rights. Judge Self found that one miner's inch per acre was necessary to irrigate the lands with Sharrott Creek water. (Department file and records.)

7. Originally the water was delivered to the property now owned by Donald and Grace Koeppen by means of the Bosckis Ditch. When the Worf pipeline was installed in 1983, the water was delivered by means of the pipeline to a privately owned drainage (sometimes called a service ditch) which crosses the northern part of the Koeppen property. Water entering the private ditch irrigated land below the ditch by seepage as it traveled the length of the ditch. In addition, water was diverted at times by placing plastic and other obstructions in the ditch causing the water to overflow and irrigate obvious dry sections. Water was also discharged into the Tiffin Tracts Ditch at the north

property boundary where it was then siphoned from that ditch through headgates to the Koeppen land east of the ditch.

(Testimony of Donald Koeppen, Department file, and Applicant's Exhibits G and J.)

8. Mr. Gilleard has lived in the area for 23 years and he has never seen water flowing at the end of the Hill (Bosckis) Ditch where water to irrigate the 17.00 acres, which would be taken out of irrigation, is located. Now the subject water is routed through the Worf pipeline, not the Bosckis Ditch, and routed through a drainage sometimes called a service ditch. It concerns Mr. Gilleard that the Hill right water is no longer transported in the Bosckis Ditch and that the water is being rerouted to the user's advantage without regard to the ditch decrees from Sharrott Creek. Mr. Gilleard also contends that some of the water picked up in the private ditch by the Koeppens was runoff from the Weicher right, now owned by Worf, and not the Hill right. (Testimony of William Gilleard.)

9. Mr. Notti believes the proposed change constitutes a new use of water. He contends no data was presented at the hearing that conclusively shows the water has been used and that Mr. Worf's letter, while stating the Koeppens' 35 inches of water had been transported through the pipeline and that there are records to prove this statement, offered nothing for the hearing record. Mr. Notti challenges the water measurements taken in the private (service) ditch, contending there is no differentiation between the spent irrigation water (runoff) from Worf's irrigation and

the water Applicant is seeking to change. There being no differentiation, Mr. Notti contends it cannot be proven the Hill right has been exercised. (Testimony of John Notti.)

10. Water in Sharrott Creek is extremely short and many of the owners of the earlier priority dates are out of water as early as July 4. Jenny Stewart owns a portion of the fourth and fifth right. Some years the Stewarts are out of water on July 1. Marlene Ebel has a portion of the fifth and sixth rights which have been shut off quite regularly before July 4. Joyce Moerkerke owns third right water which is gone before July 4. There have been years when the eighth and ninth rights have been shut off in May. All early right holders have had less water available each year. Nearly all expressed a concern that Applicants are expending a lot of time and money for a right to use Sharrott Creek water for two months or less. (Testimony of Jenny Stewart, Charlynn Steele, Marlene Ebel, Joyce Moerkerke, Darlene Cotton, John Notti, and Lee Yelin.)

Mr. McBride stated Applicant's members knew the right was a late right when they decided to purchase the water right. Mr. McBride further stated it was Applicant's money and it would be spent however the members wanted. (Testimony of Michael McBride.)

11. Baldwin Land Partnership holds seventh and ninth water rights on Sharrott Creek. Carl Baldwin contends Baldwin Land Partnership's ninth right would be adversely affected by the proposed change because the Koeppens' eighth right has not been



in use and the new acreage in the proposed place of use constitutes a new use which would place an additional burden on the source. Mr. Baldwin also questions whether transporting the water via the Worf pipeline into the service ditch, which is located in a natural drainage, then picked up in a draw is the same point of diversion as the old water right or constitutes a change in point of diversion. (Testimony of Carl Baldwin.)

12. Objector Tom Stellick owns a portion of the fourth right. Mr. Stellick has no objection if Applicant would honor his call for water. Applicant stated several times during the hearing that all legitimate calls for water would be honored. (Testimony of Tom Stellick, Michael McBride, and Lee Yelin.)

13. The State Engineer's Office, while performing the Water Resources Survey of Ravalli County in 1957, on October 30, 1957, documented the Hill right was in use. William Worf verified, in writing, that he had delivered up to 35 miner's inches of Sharrott Creek water to Donald and Grace Koeppen every year from 1983 through 1992 for irrigation use. (Applicant's Exhibits G and K.)

14. There are no pending permits or reservations of water in the source of supply. There is one pending application which would have a priority date later than any of the water rights on Sharrott Creek if granted. (Department file and records.)

15. Applicant estimates the project could be completed in approximately six months after receiving the Authorization to Change Appropriation Water Right, if granted. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA. See Finding of Fact 1.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 2 and 3.

3. The Department must issue an Authorization to Change Appropriation Water Right if the Applicant proves by a preponderance of evidence that the following criteria, set forth in 1993 Mont. Laws 370, are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) Except for a lease authorization pursuant to 85-2-436 that does not require appropriation works, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

4. The instant application does not involve salvaged water; therefore the criterion under Mont. Code Ann. § 85-2-402(2), does

not apply. This application does not involve leased water; therefore, Applicant must prove by a preponderance of the evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate.

5. The use of water, irrigation, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2) (1991). The amount of water to be changed, 16 miner's inches for irrigation of 16.00 acres, is the amount found to be necessary in the Sharrott Creek decree and is therefore not wasteful. See Finding of Fact 6.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4.

7. Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 4.

8. The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 5, 7, 12, 13, and 14.

While the Department has no jurisdiction to adjudicate a water right, it has the authority to make preliminary administrative determinations of the scope and parameters of an underlying water right to the extent necessary to fulfill its statutory duties of deciding if the criteria of Mont. Code Ann. § 85-2-402(2) have been met. *See In re Applications 20736-s41H and*

20737-s41H by City of Bozeman and Lichtenberg; In re Applications 12123-s76M and 9782-c76M by Bladholm; In re Application G(W)31227-41F by T-L Irrigation; In re Application G(W)31227-02-41F by Combs Cattle Co.

Objector Baldwin and some of its witnesses allege abandonment of the Hill right; however, the necessary proof of intent to abandon has not been made. *Featherman v. Hennessey*, 43 Mont. 310, 115 P. 983 (1911); *Rodda v. Best*, 68 Mont. 205, 217 P. 669 (1923); *In re Applications V111165-76H by Worf and V151753-76H by Brown*, (1987). Neither did the Objector provide evidence that the right has been abandoned except by testimony, offering no exhibits or other evidence to bolster his allegation of abandonment. Applicant, on the other hand, presented exhibits to confirm the water right has been in use a large part of the time since the use was established. Therefore, Applicant's underlying water right is presumed for the purposes of the hearing record to be as stated in the Claim of Existing Water Right filed by Buchholz. See Findings of Fact 5, 8, 9, and 11.

9. Whether water is available throughout the period of use claimed by Statement of Claim 76H-W043186-00 is immaterial. See Finding of Fact 10. If, in fact, the waters are insufficient for Applicant's purposes, the project will fail. The Department has no authority pursuant to the Water Use Act to dictate to appropriators exactly how or when to spend their money. *See In re Application 24921-s41E by Monforton; In re Application 24199-s41QJ by Pettapiece.*

10. There is nothing in the Sharrott Creek decree or in the statute to prevent changing the means of conveyance of a water right. As long as there is no change in the point of diversion, place of use, place of storage, or purpose of use, an appropriator may change from a ditch to a pipeline, pipeline and ditch, pipeline to a ditch, or even a pipeline and a natural drainage as the Koeppens did. See Mont. Code Ann § 85-2-102(5) (1991) and Findings of Fact 7 and 8.

11. 1993 Mont. Laws 370 require the Department to specify in a permit or in any authorized extension of time provided in Subsection (3), the time limits for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department must consider the cost and magnitude of the project and the engineering and physical features to be encountered. Applying that same logic to an Authorization to Change Appropriation Water Right, a reasonable time in which to complete the proposed project would be approximately six months. See Finding of Fact 15.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, an Authorization to Change Appropriation Water Right is granted to Larson Creek Water Users Association for Application G(W)043186-76H to change the place of

use of Statement of Claim 76H-W043186-01. The place of use shall be changed from 17.07 acres in the  $W\frac{1}{2}SE\frac{1}{4}SW\frac{1}{4}$  of Section 17, Township 9 North, Range 20 West, Ravalli County, Montana, to 4.00 acres in the  $SW\frac{1}{4}NW\frac{1}{4}$  and 1.00 acre in the  $N\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$  of Section 20, and 5.00 acres in the  $SE\frac{1}{4}NE\frac{1}{4}$ , 1.7 acres in the  $S\frac{1}{2}S\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}$  and 4.3 acres in the  $NW\frac{1}{4}SE\frac{1}{4}$  of Section 19 for a total of 16.00 acres.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2 MCA, and 85-2-404, MCA.

B. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, 1610 South 3rd St. West, Town and Country Shopping Center, P.O. Box 5004, Missoula, MT 59806 PH: (406) 721-4284.

C. The issuance of this authorization by the Department shall not reduce the Appropriator's liability for damages caused by Appropriator's exercise of this authorization, nor does the Department in issuing the authorization in any way acknowledge liability for damage caused by the Appropriator's exercise of this authorization.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Section 85-2-424, MCA.

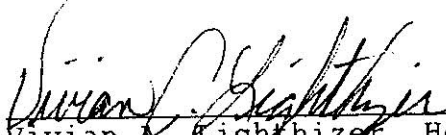
E. The deadline for completion of this Authorization, and filing the Notice of Completion of Change of Appropriation Water Right (Form 618) shall be December 31, 1994, verifying that the change has been completed as authorized.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 11<sup>th</sup> day of June, 1993.

  
Vivian A. Lighthizer, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 11<sup>th</sup> day of June, 1993, as follows:

Larson Creek Water Users  
Association  
% Lonnie Umphlett, Pres.  
625 Timber Trail  
Stevensville MT 59870

Baldwin Land Partnership  
3533 Salish Trail  
Stevensville, MT 59870

Tom & Janine Stellick  
303 S. Kootenai Rd.  
Stevensville, MT 59870

Missoula Water Resources  
Regional Office  
1610 South 3rd St. West,  
Suite 103  
P.O. Box 5004  
Missoula, MT 59806  
(via electronic mail)

T.J. Reynolds, Manager  
Helena/Missoula Water  
Resources Regional Offices  
1520 E. 6th Avenue  
Helena, MT 59620-2301

  
Cindy G. Campbell  
Hearings Unit Legal Secretary